

Office of the State Appellate Defender
Illinois Criminal Law Digest

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ACCOUNTABILITY

§1-3

People v. Walker, 2016 IL App (2d) 140566 (No. 2-14-0566, 8/17/16)

Defendant was charged by accountability with four counts of unlawful delivery of a controlled substance arising from four separate transactions. Defendant did not contest the convictions for the first three counts, which involved deliveries which occurred after defendant spoke on the telephone with an undercover police officer. However, defendant challenged the sufficiency of the evidence concerning the final transaction, which was arranged through text messaging between the undercover officer and the phone number which defendant had used for the first three transactions.

A conviction under an accountability theory requires evidence that before or during the commission of an offense, the defendant solicited, aided, abetted, or attempted to aid another in the planning or commission of the offense and did so with the intent to promote or facilitate the commission of the offense. The court rejected the argument that to obtain a conviction for a delivery arranged by text messaging, the State was required to prove that the defendant sent the text messages to the undercover officer's phone or directed a third party to deliver the cocaine to the undercover officer.

The court found that considerable evidence established that defendant was the primary user of the phone used to send the text messages. Defendant used the telephone repeatedly to contact the undercover officer to arrange drug transactions, and the officer talked to defendant several times by calling the same number. There was no evidence that anyone other than defendant ever answered a call at that number.

The court concluded that defendant's consistent use of the telephone for voice communication is compelling evidence that the cell phone belonged to the defendant and that he sent the text arranging the final delivery. In the alternative, even if someone other than defendant sent the messages, defendant would still be accountable for the delivery of cocaine if he provided the telephone to a third party and intended that it be used to set up a drug deal. Although it was conceivable that the telephone was used without defendant's knowledge or that defendant provided the telephone to another for an innocent purpose, the trier of fact is not obligated to elevate that possibility to the status of a reasonable doubt.

(Defendant was represented by Assistant Defender Lucas Walker, Elgin.)

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COLLATERAL REMEDIES

§9-1(i)(1)

People v. Bailey, 2016 IL App (3d) 140207 (No. 3-14-0207, 8/22/16)

The Appellate Court held that Section 122-1(f) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f)) does not prohibit the State from responding to a motion for leave to file a subsequent post-conviction petition. In general, parties are allowed to respond to motions filed by their opponents. Because §122-1(f) does not refer at all to whether the State may respond to a motion for leave to file a subsequent petition, there is no reason to believe that the legislature intended that the general rule was inapplicable.

The court acknowledged that proposed legislation would amend §122-1(f) to provide that the decision whether to grant leave to file a successive petition must be made without input by the State, but noted that such legislation has not been acted upon by the legislature.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

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COUNSEL

§13-3(a)

People v. Aguirre-Alarcon, 2016 IL App (4th) 140455 (No. 4-14-0455, 8/3/16)

When the trial court appoints counsel to represent defendant, it may order defendant to reimburse the county or State, but it must first hold a hearing to determine defendant's ability to pay "no later than 90 days after entry of the final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a).

Here the trial court conducted no hearing whatsoever and neither the court nor any of the parties mentioned the reimbursement fee at any of the proceedings. The trial court instead *sua sponte* included the fee in a supplemental sentencing order.

The State conceded error but argued that the case should be remanded for a hearing on defendant's ability to pay. Defendant argued that the fee should be vacated without any remand because the trial court failed to hold a hearing as required by statute.

The Appellate Court first held that although defendant failed to object to the fee, application of the forfeiture doctrine would be inappropriate where the trial court failed to follow the procedural safeguards contained in the statute.

The Appellate Court held that remand was inappropriate where the trial court failed to hold any sort of hearing on defendant's ability to pay within 90 days as required by the statute. The Appellate Court thus vacated the fee outright.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

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EVIDENCE

§19-23(a)

People v. Mister, 2015 IL App (4th) 130180-B (No. 4-13-0180, rev. op. 8/4/16)

1. Under Illinois Rule of Evidence 701, a lay witness may give opinion testimony which is: (1) rationally based on the perceptions of the witness, and (2) helpful to a clear understanding of the testimony or to determination of a fact or issue. Opinion testimony is not objectionable merely because it embraces an ultimate issue.

The court concluded that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance video where there is a basis to believe that the witness is more likely than the jury to correctly identify the individual in the videotape. The court rejected holdings that the witness must have prior familiarity with the subject in order to testify concerning his or her identity, finding that the witness's degree of familiarity with the subject goes to weight rather than admissibility. The court also rejected the argument that such testimony is admissible only if the subject's appearance has changed between the time the videotape was made and the trial.

2. A casino security guard's testimony concerning the actions of two persons on a surveillance video was admissible although the guard was not present when the video was made and did not observe the events that were depicted. The court concluded that the guard's testimony was rationally based on opinions he had developed by repeatedly viewing the video.

In addition, the testimony aided the trier of fact by providing a clear understanding whether the two persons were at the casino and left in the same vehicle. The court noted that the video contained nearly four hours of footage, lacked clarity, was difficult to assess, and involved "fluid scenes and numerous individuals and vehicles." Thus, in the absence of the guard's opinion testimony, the jury would likely miss details concerning the events captured by the camera.

The court found that the testimony did not invade the province of the jury where the guard merely linked the individuals in the video to still photographs which had been taken the same night. Whether the defendant in the courtroom was the person who was depicted in the video was left to the jury's determination.

Finally, the court noted that the weight to be given to the opinion testimony was for the trier of fact to assess. Defense counsel extensively cross-examined the guard and had an opportunity to highlight any deficiencies in the testimony regarding the witness's familiarity with the defendant or the clarity of the videotape. Under these circumstances, the province of the jury was not compromised.

Defendants' conviction for armed robbery was affirmed.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

§19-27(a)

People v. Fountain, 2016 IL App (1st) 131474 (No. 1-13-1474, 8/23/16)

Under the **Frye** test, scientific evidence is admissible only if the methodology or scientific principle upon which an expert opinion is based has gained general acceptance in the relevant field. But the **Frye** test only applies to new or novel scientific methodologies, those that are original or striking, or do not resemble something formerly known or used.

An FBI agent testified for the State as an expert in the field of historical cell site analysis. He testified that when a cell phone is used it communicates with a cell tower. A call detail record is generated showing the time the call occurred and which cell tower was used. The agent testified about the cell towers defendant's phone used, thereby allowing him to give an opinion as to defendant's approximate location at a given time, and hence show that defendant was in the vicinity of the crimes when they occurred.

Defendant argued that a **Frye** hearing should have been held to determine whether historical cell site analysis was admissible. The court disagreed. It held that historical cell site analysis is not the product of new or novel scientific principles. All the expert did in this case was read defendant's cell phone records and transfer that information to a map to show defendant's location. Reading cell phone records and creating a map is not a scientific procedure or technique. Additionally, this type of analysis is not new or novel and has been widely accepted as reliable by numerous courts.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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HOMICIDE

§26-5(a)

[People v. Olivieri](#), 2016 IL App (1st) 152137 (No. 1-15-2137, 8/2/16)

1. To establish reckless discharge of a firearm, the State must prove that the defendant discharged a firearm in a reckless manner which endangered the bodily safety of an individual. 720 ILCS 5/24-1.5(a). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise. An accident is not equated with recklessness.

2. The court concluded that the State failed to prove that defendant acted recklessly in discharging a firearm. Defendant had placed live rounds in his pistol when he went for a walk, and upon returning to his apartment attempted to unload the pistol but unintentionally fired a round when his finger “twitched.” The round went through the apartment wall and into an adjacent apartment.

The court noted that unlike precedent cited by the State, defendant was not intoxicated and was not threatening anyone. Instead, he was merely attempting to unload a pistol. Under these circumstances, defendant did not engage in any reckless conduct.

Because the element of recklessness was not proved beyond a reasonable doubt, defendant’s conviction for reckless discharge of a firearm was reversed.

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INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-4(b)

[People v. Carey](#), 2016 IL App (1st) 131944 (No. 1-13-1944, 8/22/16)

The due process right to be adequately informed of the charged offense applies to the predicate felony in a felony murder charge. When the charging instrument is attacked for the first time on appeal, the court must determine whether the charge was specific enough to allow defendant to prepare his defense and to bar future prosecution arising out of the same conduct. Additionally, when the challenge is made for the first time on appeal the defendant must show that he was prejudiced in the preparation of his defense.

The State charged defendant with first degree murder alleging that he caused the death of his co-offender while committing the offense of armed robbery. The charge did not specify which of the two mutually exclusive forms of armed robbery defendant committed: armed robbery with a firearm, 720 ILCS 5/18-2(a)(1), or armed robbery with a dangerous weapon, 720 ILCS 5/18-2(a)(2).

The court held that since the indictment did not indicate through statutory citation or other specific detail which of the two armed robbery offenses formed the predicate felony, the indictment failed to adequately inform defendant of the charges against him. The court rejected the State's argument that defendant could look to the nolle charges, which included a charge of attempted armed robbery with a firearm, to determine the specific nature of the felony murder charge. Since the State declined to prosecute defendant on the nolle charge, "the State cannot rely on its contents to supplement" the defective murder charge.

The court further held that the defective charge prejudiced defendant in preparing his defense. Since the indictment did not specify which form of armed robbery constituted the predicate felony, "the State was effectively free to proceed at trial under either theory." There was some doubt about whether the gun defendant carried was a firearm since it may not have been operable. By keeping the dangerous weapon theory open, the State may have been able to convict defendant even if the jury found that he was not carrying a firearm.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

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JUVENILE

§§33-6(a), 33-6(e)

[People v. Wilson](#), 2016 IL App (1st) 141500 (No. 1-14-1500, 8/19/16)

1. Public Act 99-69 provided that "On or after the effective date" of the Act, when a person under the age of 18 commits an offense and is sentenced as an adult the sentencing court must consider a specified list of additional mitigating factors. Defendant was found guilty of attempted first degree murder and aggravated battery with a firearm which he committed at age 17 but about three years before the effective date of P.A. 99-69. On appeal, he argued that he was entitled to remand for a new sentencing hearing because P.A. 99-69 should be applied retroactively.

The Appellate Court rejected this argument, finding that the plain language of the Act indicated that the legislature intended it to be applied only to offenses which occurred after the effective date. Unambiguous statutory language is to be applied as written, without resort to other rules of statutory construction.

2. Defendant also argued that the Eighth Amendment is violated by the exclusive jurisdiction statute (705 ILCS 405/5-120), which provides that 17-year-old accused felons may not be prosecuted under the Juvenile Court Act, and by the combination of the exclusive jurisdiction statute, the mandatory 25 years to life firearm enhancement (720

ILCS 5/8-4(a), (c)(1)(D)), and the truth-in-sentencing provisions. The court rejected these arguments, noting that the Eighth Amendment requires only that where the offender was a juvenile at the time of the offense, the sentencing authority must have an opportunity to consider mitigating circumstances connected to age before imposing a death sentence or a sentence of life imprisonment. Here, the trial court considered the relevant factors in aggravation and mitigation before fashioning the sentence.

Similarly, the combination of acts did not violate the Eighth Amendment. The court noted that Illinois courts have rejected attempts to extend **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012) beyond cases involving mandatory life sentences without the possibility of parole.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

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NARCOTICS (CONTROLLED SUBSTANCES; CANNABIS)

§35-1

People v. Toliver, 2016 IL App (1st) 141064 (No. 1-14-1064, 8/9/16)

A conviction for possession of more than one but less than 15 grams of heroin with intent to deliver is elevated from a Class 1 to a Class X felony if the offense occurs within 1000 feet of a school. 720 ILCS 570/401(c)(1), 407(b)(1). The court concluded that the State need not prove that a building was operating as a “school” on the date of the offense in order for the enhancement to apply.

Thus, the enhancement applied where defendant was convicted of possession with intent to deliver within 1000 feet of a school building which had closed more than a year earlier. The court noted that §407(c) provides that “the time of day, time of year and whether classes were currently in session at the time of the offense is irrelevant.” The court also noted that it is reasonable to infer that although schools are not in session during summer vacations and on weekends, the buildings are still “schools” at which children might congregate.

The court also noted that the closed school building was owned and maintained by the Chicago Public School system, had the purpose, design, and site characteristics of a school, and according to two State’s witnesses was recognized as a school within the surrounding neighborhood. “Whether closed to students, temporarily or permanently, the structure still exists as a school building to draw neighborhood children to its premises.”

The court also noted that at trial defense counsel stipulated that the arrest occurred within 1000 feet of a school.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender David Berger, Chicago.)

§35-3(c)(1)

People v. Bates, 2016 IL App (1st) 140619 (No. 1-14-0619, 8/3/16)

To convict a defendant of possession of controlled substances, the State must prove that the drugs were in defendant's immediate and exclusive control. Constructive possession does not require actual dominion over the drugs, but can be inferred from an intent and capability to maintain control. Control of the location where the drugs are found is not essential to prove constructive possession.

The police executed a search warrant on a single family house. Inside they found several men including defendant and another man who were sitting at a dining room table covered with drugs and packaging materials. There was no evidence defendant was touching any of the items on the table. When the police entered, all the men fled and defendant was arrested outside the house. No weapons, drugs, or money were found on defendant.

The court held that the State failed to prove that defendant possessed the controlled substances. There was no evidence that defendant exercised control over the premises such that a trier of fact could infer his control over the drugs. Although defendant was sitting at the dining room table when the police entered, there was no evidence he touched any of the drugs or other materials on the table. While defendant must have been aware of the drugs, nothing proved that he was in possession of them.

Defendant's conviction for possession of controlled substances was reversed.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

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PROBATION

§§40-4(a), 40-4(c)

People v. Morger, 2016 IL App (4th) 140321 (No. 4-14-0321, 8/3/16)

Defendant was sentenced to 48 months probation with certain probation conditions checked on the form sentencing order, including that the probation was to be served on "Sex Offender Probation under the additional conditions provided by Court Services."

Defendant signed an acknowledgment which stated that additional probation conditions could be imposed.

Four days later, the probation department imposed 24 additional conditions. The Appellate Court held that defendant was improperly sentenced.

The power to impose sentence belongs to the judiciary, and may not be delegated to a third party. Thus, probation conditions must be imposed by the trial judge. Here, the trial judge could have imposed the additional conditions by including them in the probation order, informing defendant of the special conditions, and giving him a copy of the order. However, it was improper to allow the probation department to impose conditions several days after the sentencing hearing.

Because the lower court delegated to the probation department the power to determine probation conditions, resentencing was required.

(Defendant was represented by Assistant Defender Erica Cook-Nichols, Springfield.)

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REASONABLE DOUBT

§42-4

People v. Tate, 2016 IL App (1st) 140619 (No. 1-14-0619, 8/3/16)

To convict a defendant of possession of controlled substances, the State must prove that the drugs were in defendant's immediate and exclusive control. Constructive possession does not require actual dominion over the drugs, but can be inferred from an intent and capability to maintain control. Control of the location where the drugs are found is not essential to prove constructive possession.

The police executed a search warrant on a single family house. Inside they found several men including defendant and another man who were sitting at a dining room table covered with drugs and packaging materials. There was no evidence defendant was touching any of the items on the table. When the police entered, all the men fled and defendant was arrested outside the house. No weapons, drugs, or money were found on defendant.

The court held that the State failed to prove that defendant possessed the controlled substances. There was no evidence that defendant exercised control over the premises such that a trier of fact could infer his control over the drugs. Although defendant was sitting at the dining room table when the police entered, there was no evidence he touched any of the drugs or other materials on the table. While defendant must have been aware of the drugs, nothing proved that he was in possession of them.

Defendant's conviction for possession of controlled substances was reversed.

(Defendant was represented by Assistant Defender Chan Yoon, Chicago.)

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SEARCH & SEIZURE

§§44-4(a), 44-4(b)

People v. Williams, 2016 IL App (1st) 132615 (No. 1-13-2615, 8/19/16)

1. Two police officers on patrol in a high-crime area saw defendant sitting in a car in front of an abandoned house. As they passed, defendant made eye contact with the officers and then got out of his car. The officers turned their car around and parked behind defendant's car. One officer got out of the car and said to defendant, "police, can I talk to you?" The officer then walked over to defendant's car and told defendant to come there.

Defendant met the officer at his car. The officer testified that defendant was not free to leave because he had been parked in front of an abandoned building in a high crime area. After further questioning and investigation, defendant gave the officer permission to search his car, where narcotics were discovered.

2. An officer seizes someone through physical force or a show of authority when a reasonable innocent person would not feel free to leave. An officer may approach a person and ask questions without conducting a seizure as long as his request would not make a reasonable person believe that compliance is required. Four factors indicate that a seizure has occurred: (1) the threatening presence of several officers; (2) display of weapons; (3) physical touching by an officer; and (4) language or tone indicating compliance is required.

The court held that defendant was seized where he was required to comply with the officer's request to stop, return to the vehicle, and answer questions. Although there were only two officers present and neither displayed any weapons or touched defendant, one of the officers used language or tone to compel defendant's compliance with his requests, and thus conveyed to defendant that he was not free to leave or decline those requests.

3. To legally effectuate a **Terry** stop, an officer must have a reasonable articulable suspicion that a defendant is engaged in criminal activity. A defendant's mere presence in a high-crime area is not enough to support reasonable suspicion.

The court held that the officers lacked reasonable suspicion to stop defendant. All they knew was that defendant was parked in front of an abandoned building in a

high crime area. This activity does not show that defendant was engaged in criminal activity.

The court suppressed the narcotics recovered from defendant's car and reversed defendant's conviction for possession of a controlled substance.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

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§§44-9, 44-13

People v. Franklin, 2016 IL App (1st) 140049 (No. 1-14-0059, 8/24/16)

1. A warrantless search is unconstitutional unless it falls within one of the three exceptions to the warrant requirement that are recognized in Illinois: (1) search incident to arrest; (2) probable cause accompanied by exigent circumstances; and (3) consensual searches.

2. Investigating a theft, the police went to a motel room looking for the offender, DB. When they arrived, defendant was just leaving the room. Defendant told the police the room was rented in his name and DB was inside. When defendant let the police into the room, the officers saw DB sleeping in a bed and a bag of marijuana on the night-stand between the two beds. The officers recovered the marijuana and did a quick search of the room. An officer checked the ceiling tiles since that is a frequent place to stash contraband, but none of them had been disturbed.

When the officers radioed for a drug-sniffing dog, DB ran out of the room. The officers ran after him, leaving defendant alone. When the officers returned, they saw that the ceiling tiles in the bathroom had been moved. The officers handcuffed defendant, sat him on the bed, and then searched the area behind the tiles, where they found two guns.

3. The court held that the search of the area behind the tiles was illegal. First, the search was not a permissible search incident to arrest. A search incident to arrest only extends to the person arrested and the area within his reach. Here, the bathroom area was separate from the room where defendant had been arrested and handcuffed and thus was not within his immediate reach. The police may have had probable cause to search that area, but probable cause standing alone is insufficient to justify the warrantless search.

There were also no exigent circumstances justifying the search. Exigent circumstances exist where there is compelling need for prompt action and there is no time to obtain a warrant. Here, by the time the police searched the area behind the tiles, defendant was already in custody and handcuffed so there were no exigent circumstances.

Since the weapons recovered during the illegal search were the only evidence supporting defendant's unlawful use of weapons by a felon conviction, the court reversed outright defendant's conviction.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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SENTENCING

§§45-1(a), 45-1(b)(2)

[People v. Hunter](#), 2016 IL App (1st) 141904 (No. 1-14-1904, modified upon denial of rehearing 8/12/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied,

the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

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§45-1(b)(3)

People v. Owens, 2016 IL App (4th) 140090 (No. 4-14-0090, 8/2/16)

Under **Apprendi**, any fact (other than the fact of a prior conviction) that increases a penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Illinois has codified **Apprendi** in the code of criminal procedure. 725 ILCS 5/111-3(c-5).

Defendant was convicted of driving with a revoked license, which is ordinarily a Class A misdemeanor. 625 ILCS 5/6-303(a). But when a defendant has been previously convicted of driving with a revoked license and the original revocation was for driving under the influence, it is a Class 4 felony. 625 ILCS 5/6-303(d). Defendant conceded that the existence of the prior revocation was a prior conviction not covered by **Apprendi**, but argued that the reason for the revocation was more than the mere fact of a prior conviction and thus under **Apprendi** had to be proved to a jury beyond a reasonable doubt.

The court rejected defendant's argument. It held that the difference between a prior conviction and the reason for the prior conviction was "a distinction without a difference," and thus **Apprendi** did not apply.

The dissent believed that the reason for the original revocation was a fact that went beyond the mere existence of a prior conviction and thus **Apprendi** should apply.

(Defendant was represented by Assistant Defender Daaron Kimmel, Springfield.)

§45-10(c)(1)

People v. White, 2016 IL App (2d) 140479 (No. 2-14-0479, 8/1/16)

Under 730 ILCS 5/5-8-2(a) and Illinois Supreme Court precedent, a trial court may impose an extended-term sentence only for the conviction of the most serious class of offense. However, extended-term sentences may be imposed on separately charged, differing class offenses that arise from unrelated courses of conduct.

Where defendant was charged in one indictment with unlawful sale of a firearm to a felon and being an armed habitual criminal, and both offenses arose from obtaining a firearm and making arrangements to sell it to a previously convicted felon, an extended-term sentence was permitted only on the Class X offense of being an armed habitual criminal. Because the trial court failed to impose an extended-term sentence on the Class X offense and instead imposed an extended-term only on the Class 3 offense of unlawful sale of a firearm to a felon, the court reduced the sentence on the Class 3 offense to the maximum nonextended term of five years.

(Defendant was represented by Assistant Defender Josette Skelnick, Elgin.)

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§45-16(b)

People v. Jones, 2016 IL App (1st) 142582 (No. 1-14-2582, 8/2/16)

1. The use of *nunc pro tunc* orders or judgments is limited to incorporating into the record action which was previously taken by the court but inadvertently omitted through clerical error. Thus, a *nunc pro tunc* order is proper only to reflect action that occurred previously, and not to “backdate” the effective date of an action. A *nunc pro tunc* order must be based on some note, memorandum, or other memorial in the court record.

2. Defendant was released on bond on retail theft charges, and was taken into custody on a different charge while he was on bond. Approximately three weeks after he was taken into custody on the second charge, defense counsel asked the trial court to exonerate the bond on the instant charge *nunc pro tunc* to the date of the arrest, so defendant could receive credit on the sentence in the instant charge from the date of

his arrest on the unrelated charge. The prosecution stated that it had no objection to the request.

The Appellate Court concluded that because there had been no court action concerning bond in this case on the date defendant was taken into custody on the second charge, it was improper to use a *nunc pro tunc* order. Defendant was entitled to pretrial custody credit in this case only for the time between the exoneration of his bond and his conviction.

3. In the course of its holding, the court noted that under Supreme Court precedent, a defendant who is arrested and placed in custody for one charge while on bond on an unrelated charge is returned to custody on the latter charge only when his bond on that charge is revoked. Once bond has been revoked, the defendant is in custody on both charges and is entitled to credit for time in custody against the sentences for both charges.

(Defendant was represented by Assistant Defender Bob Hirschorn, Chicago.)

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SPEEDY TRIAL

§§47-1(a), 47-1(b), 47-2, 47-3, 47-4, 47-7

People v. Kilcauski, 2016 IL App (5th) 140526 (No. 5-14-0526, 8/31/16)

1. The constitutional right to a speedy trial is evaluated by consideration of four factors: the length of the delay, the reasons for the delay, defendant's assertion of the right to a speedy trial, and prejudice to the defense. No single factor is necessary or sufficient to find that the right to a speedy trial has been denied. Instead, all of the factors must be considered along with any other relevant circumstances to determine whether the fundamental right to a speedy trial has been violated.

In considering whether there is a constitutional speedy-trial violation, the length of the delay is the triggering mechanism for consideration of the other factors. However, no fixed period of time is required. Deliberate delays weigh heavily against the State, while negligence weighs “a little less heavily.” Whether and how the defendant asserts his right is also a factor.

In assessing prejudice, courts are to consider the interests that the constitutional right to a speedy trial is designed to protect, including preventing undue and oppressive incarceration, minimizing the anxiety and concern that accompanies public accusations, and limiting the possibility that the defense will be impaired.

2. The court concluded that under the “unique” circumstances of this case, defendant’s constitutional right to a speedy trial was violated. Defendant was arrested

and charged in Clinton County in June of 2013. At some point between June 24 and July 3, 2013, the sheriff's department voluntarily relinquished physical custody of the defendant to authorities in St. Louis County, Missouri. However, there were no extradition proceedings, no waiver of extradition, and no court order from Clinton County.

The Clinton County felony charge was dismissed without prejudice on August 7, 2013, because the State was unable to obtain defendant's return from Missouri and therefore could not provide a preliminary hearing within 30 days of the arrest. The State then elected to dismiss an accompanying misdemeanor charge on August 8, 2013.

Nearly a year later, the State secured an indictment on identical charges. Defendant was subsequently arrested on a warrant based on the indictments. The record showed that the defendant had never been released from the custody of the Clinton County sheriff's department, although the charges had been dismissed, and that defendant remained in the physical custody of St. Louis County until March of 2014. "Thus, there was a delay of more than a year between the date the defendant was arrested and detained on the original charges and the date of his indictment on those same charges. The delay between the dismissal of the original charges and the filing of the bill of indictment on the same charges was almost a year."

The court concluded that under these circumstances, defendant's constitutional right to a speedy trial was violated. Defendant's restraint in Clinton County began on the date he was arrested in 2013, and in the absence of an order releasing him from Clinton County custody continued through the date of the subsequent indictment and arrest. The court noted that the delay was for more than a year and was therefore presumptively prejudicial, and that the State offered no justification for the delay.

The court also noted that defendant attempted to assert his right to a speedy trial while he was being held in St. Louis County by filing a handwritten motion requesting a speedy trial and disposition of the charges in Clinton County. Although the Clinton County charges had been dismissed one week earlier, there was no indication that defendant was aware of the dismissal.

The court also noted that defendant was prejudiced by the delay because he was subjected to pretrial incarceration of at least eight months, he alleged that he was unable to locate the only witness to the alleged Clinton County offense, and he lost the opportunity for concurrent sentencing with the St. Louis conviction.

The court rejected the argument that the State should not be held responsible for the delay because the Clinton County Sheriff did not notify the State's Attorney or the court that it was relinquishing custody of the defendant to St. Louis County. The Sheriff's Department is part of the State, and its negligent unlawful actions are attributed to the State.

The court also rejected the State's attempt to blame defendant for failing to provide notice of his whereabouts to the Clinton County prosecutor after the transfer to St. Louis

County. The record shows that the State had actual knowledge of defendant's whereabouts, because the Assistant State's Attorney stated in open court that he had spoken to authorities in St. Louis County and confirmed that defendant was in custody.

3. The court concluded that defendant's statutory right to a speedy trial was also violated. Under the speedy trial statute, the State has 120 days to begin trial once the defendant is taken into custody, unless there is delay occasioned by the defendant. 725 ILCS 5/103-5(a). Here, the speedy trial clock started to run when defendant was taken into custody on June 23, 2013. Although the Clinton County Sheriff voluntarily transferred defendant to St. Louis County authorities, defendant remained in the custody of Clinton County in the absence of an order releasing him from custody. Thus, the speedy-trial period was not tolled.

When defendant was released from Missouri custody in March 2014, therefore, he had been in continuous custody for more than eight months. Because defendant did not contribute to the delay, the trial court did not err by finding that the statutory right to a speedy trial was violated.

(Defendant was represented by Assistant Defender Maggie Heim, Mt. Vernon.)

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STATUTES

§48-1

People v. Wilson, 2016 IL App (1st) 141500 (No. 1-14-1500, 8/19/16)

Public Act 99-69 provided that "On or after the effective date" of the Act, when a person under the age of 18 commits an offense and is sentenced as an adult the sentencing court must consider a specified list of additional mitigating factors. Defendant was found guilty of attempted first degree murder and aggravated battery with a firearm which he committed at age 17 but about three years before the effective date of P.A. 99-69. On appeal, he argued that he was entitled to remand for a new sentencing hearing because P.A. 99-69 should be applied retroactively.

The Appellate Court rejected this argument, finding that the plain language of the Act indicated that the legislature intended it to be applied only to offenses which occurred after the effective date. Unambiguous statutory language is to be applied as written, without resort to other rules of statutory construction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

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§48-2

People v. Hunter, 2016 IL App (1st) 141904 (No. 1-14-1904, modified upon denial of rehearing 8/12/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive

impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

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UNLAWFUL USE OF A WEAPON

§53-1

People v. Olivieri, 2016 IL App (1st) 152137 (No. 1-15-2137, 8/2/16)

1. To establish reckless discharge of a firearm, the State must prove that the defendant discharged a firearm in a reckless manner which endangered the bodily safety of an individual. 720 ILCS 5/24-1.5(a). A person acts recklessly by consciously disregarding a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise. An accident is not equated with recklessness.

2. The court concluded that the State failed to prove that defendant acted recklessly in discharging a firearm. Defendant had placed live rounds in his pistol when he went for a walk, and upon returning to his apartment attempted to unload the pistol but accidentally fired a round. The round went through the apartment wall and into an adjacent apartment.

The court noted that unlike precedent cited by the State, defendant was not intoxicated and was not threatening anyone. Instead, he was merely attempting to unload a pistol. Under these circumstances, defendant did not engage in any reckless conduct.

Because the element of recklessness was not proved beyond a reasonable doubt, defendant's conviction for reckless discharge of a firearm was reversed.

§53-2

People v. Perkins, 2016 IL App (1st) 150889 (No. 1-15-0889, 8/31/16)

In **McFadden**, 2016 IL 117424, the Illinois Supreme Court held that a conviction that is based on a statute later declared facially unconstitutional remains valid until

a court with proper reviewing authority has declared otherwise. In **McFadden**, the Supreme Court held that when defendant committed the offense of unlawful use of weapons by a felon (UUWF) he had a valid felony conviction that made it unlawful for him to possess firearms even though the prior felony was based on a facially unconstitutional statute.

Here defendant was convicted of being an armed habitual criminal (ACH) based in part on a prior weapons conviction that was premised on a facially unconstitutional statute. The Appellate Court could see no meaningful distinction between ACH and UUWF, and thus held that the **McFadden** controlled the outcome of this case.

(Defendant was represented by Assistant Defender Michael Gomez, Chicago.)

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WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-1(a)

People v. Aguirre-Alarcon, 2016 IL App (4th) 140455 (No. 4-14-0455, 8/3/16)

The trial court imposed a fee to reimburse the county for the cost of appointed counsel without first conducting a hearing to determine defendant's ability to pay as required by statute. 725 ILCS 5/113-3.1(a). The Appellate Court held that although defendant failed to object to the fee, application of the forfeiture doctrine would be inappropriate where the trial court failed to follow the procedural safeguards contained in the statute.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

§56-1(b)(9)(b)

People v. Carey, 2016 IL App (1st) 131944 (No. 1-13-1944, 8/22/16)

Defendant argued for the first time in a petition for rehearing that the indictment for first degree felony murder was deficient because it failed to specify which of Illinois' two mutually exclusive types of armed robbery (firearm or dangerous weapon) formed the underlying predicate offense.

Generally, issues may not be raised for the first time in a petition for rehearing. The court nonetheless addressed defendant's argument since the failure to charge an offense is a defect that may be attacked at any time.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)